Before the
Administrative Hearing Commission
State of Missouri

DALE GEORGE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 13-1854 DI
	)	
DIRECTOR OF THE DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION,	)	
	)	
Respondent.	)	

DECISION

Respondent Director of the Department of Insurance, Financial Institutions and Professional Registration properly refused Petitioner Dale George's application for an individual resident insurance producer license.

Procedure

Mr. George filed a complaint on October 23, 2013, appealing the Director's decision to refuse his application for licensure. The Director filed an answer on November 19, 2013.

On December 2, 2013, Mr. George filed a motion for an expedited hearing. We granted that motion and set the hearing in this case for January 6, 2014. On December 5, 2013, the Director filed a motion for expedited discovery and a motion for leave to file a summary decision motion less than 45 days before the hearing. We granted both motions on December 9, 2013.

The Director filed his motion for summary decision on December 19, 2013. We ordered Mr. George to respond to it by December 30, 2013.

In light of the expedited time frame in this case, we heard oral argument on the Director's motion on December 30, 2013. The Director was represented by his attorney, Cheryl Nield, who appeared in person. Mr. George represented himself and appeared by telephone.

Under 1 CSR 15-3.446(6)(A),[1] we may grant summary decision "if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts." The parties must establish the facts by admissible evidence. 1 CSR 15-3.446(6)(B). The Director filed a business records affidavit and business records (Respondent's Exhibits 1, 1A, and 1B). Those records are admissible. § 536.070(10), RSMo (Supp. 2012); § 490.692, RSMo (2000).

The Director also submitted court records from the District Court of Wrentham, Massachusetts (Respondent's Exhibit 2). These records are certified only by a court clerk. But Missouri law requires not only the attestation of a court clerk, but also certification by a judge of the out-of-state court. § 490.130, RSMo (Supp. 2012); *State v. Martinez*, 407 S.W.3d 669, 673 (Mo. App. S.D. 2013); and *State v. Dismang*, 151 S.W.3d 155, 161 (Mo. App. S.D. 2004). *See also Swallow v. Enterprise Truck Lines, Inc.*, 894 S.W.2d 232, 235 (Mo. App. E.D. 1995) (Labor and Industrial Relations Commission did not err in disregarding Indiana court order that was not certified in accordance with § 490.130).[2] Because Exhibit 2 is not admissible, we will not rely on it as evidence of Mr. George's out-of-state conviction.

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[1] References to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

[2] We note that generally, authenticated business records offered in administrative proceedings, such as the instant one, are admissible under § 536.070(10). We would have little difficulty treating the Director's Exhibit 2 as a properly authenticated business record. But "[w]hen the same subject matter is addressed in general terms in one statute and in specific terms

But we note that the pertinent facts contained in Exhibit 2 are also contained in Exhibit 1A—a copy of material Mr. George submitted below in connection with his application for licensure, including his Massachusetts judgment of conviction and his sentencing form.

Additionally, the Director points to Mr. George's responses to the Director's expedited discovery—interrogatories, requests for production, and requests for admissions. In his answers to the requests for admissions, Mr. George admits the pertinent facts related to his conviction, and such admissions are admissible evidence. 1 CSR 15-3.446(6)(B). *See also United Mo. Bank, N.A. v. City of Grandview*, 179 S.W.3d 362, 371 (Mo. App. W.D. 2005) (admissions against interest are admissible).

Mr. George argued during the teleconference that he did not commit the crime, and that he only pled guilty because his attorney advised him to. The argument echoes his statement of innocence contained in the Director's Exhibit 1B, supplemental material submitted by Mr. George in connection with his application. Exhibit 1B, as noted above, is admissible evidence because it was submitted in proper form as a business record. However, as addressed in our conclusions of law, Mr. George's claim herein of innocence cannot suffice to demonstrate he did not commit the crime for which he was convicted, even if we found the claim credible.

We draw the findings of fact from the admissible evidence submitted by the Director with his motion, and Mr. George's admissions.

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in another, the more specific controls over the more general." *Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996). And we have found no case law addressing authentication of foreign court records and the application of § 490.130 versus § 536.070(10) in administrative proceedings. We note that the Eastern District Court of Appeals in *Swallow*, an appeal from an administrative proceeding involving a foreign court's record, did not mention § 536.070(10) at all. 894 S.W.2d at 235.

We have therefore followed the specific-versus-general rule here, and applied the more specific statute, § 490.130, to answer the question of admissibility of the Director's Exhibit 2.

We note, though, that the distinction between the two statutes is without a practical difference in the instant case. As we discuss elsewhere in our decision, evidence of Mr. George's Massachusetts criminal proceedings appears otherwise in the record.

Findings of Fact

1. The Director of the Department of Insurance, Financial Institutions and Professional Registration is responsible for the supervision, regulation, and discipline of individual resident insurance producers.

2. Dale George pled guilty in the District Court of Wrentham, Massachusetts, case no. 0457CR001356, on July 13, 2005, to one count of indecent assault and battery on a child under fourteen years of age, in violation of Mass. Gen. L. Ann. ch. 265, §13B (West 2005), and one count of assault and battery, in violation of Mass. Gen. L. Ann. ch. 265 § 13A(a) (West 2005).

3. The court placed Mr. George on probation until November 9, 2007.

4. The victim of Mr. George's crime was his 13-year-old stepdaughter.

5. Mr. George applied for a Missouri insurance producer license on June 4, 2013.

6. Mr. George was asked on his application form whether he had "ever been convicted of a crime, had a judgment withheld or deferred, or [was] currently charged with committing a crime." He answered yes, and submitted a copy of the Massachusetts court judgment, along with a statement explaining the crime.

7. Based on Mr. George's conviction of indecent assault and battery on a child under fourteen years of age, and the Director's determination that the crime was a felony, as well as a crime of moral turpitude, the Director refused Mr. George's application for an individual resident insurance producer license.[3]

[3] The record reflects that the Director's written notice of refusal of Mr. George's application was dated September 20, 2013. But the Director mailed the written notice by regular mail to Mr. George, or delivered it to him by UPS, or both, on or after September 23, 2013. *See* Respondent's Answer, Exhibit 1, p. 4 (certificate of service). Mr. George filed his complaint herein on October 23, 2013, which was the 30th day after September 23. We therefore consider

Conclusions of Law

We have jurisdiction. § 621.045, RSMo (Supp. 2012). The Director bears the burden of proving by a preponderance of the evidence that cause exists to deny Mr. George a license. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012)(dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *Kerwin*, 375 S.W.3d at 230, *quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000).

Under § 375.141, RSMo (Supp. 2012),

> 1. The director [of the Department of Insurance, Financial Institutions and Professional Registration] may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:
>
> * * *
>
> (6) Having been convicted of a felony or crime involving moral turpitude[.]

We conclude that Mr. George was convicted of a felony. We also conclude that he was convicted of a crime of moral turpitude. Therefore, the Director had grounds to refuse Mr. George's application under either or both bases.

Mr. George was convicted of a felony

The disposition of the charge constituted a conviction

Under § 375.141.1(6), we first examine whether Mr. George was "convicted" of a crime, and conclude he was.

Mr. George pled guilty, in relevant part, to one count of indecent assault and battery of a

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his complaint timely filed. *See* § 621.120, RSMo (2000) (requiring complaint to be filed within 30 days after delivery or mailing by certified mail of written notice of refusal).

child under fourteen years of age, under Mass. Gen. L. ch. 265, §13B (West 2005), which provides for a sentence not exceeding ten years in the state prison or not exceeding two and one-half years in the house of correction. *Id.*[4] The Massachusetts court placed him on so-called "straight" probation.

Missouri law does not provide for straight probation. *See* § 557.011.2, RSMo (Supp. 2012) (establishing range of potential dispositions of offender after finding of guilt). Under Missouri law, if a person is placed on probation and receives a suspended imposition of sentence, he has not been convicted. *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. 1993). If a sentence is imposed, he has been convicted. *Id.*

We conclude that Mr. George was convicted notwithstanding the fact of his straight probation. A "defendant placed on straight probation [in Massachusetts] does not receive a suspended sentence but is simply placed on probation for a certain term." *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1246 (Mass. 2006) (emphasis added). Further, "[p]robation, [in Massachusetts], whether 'straight' or coupled with a suspended sentence, is a legal disposition which allows a criminal offender to remain in the community subject to certain conditions and under the supervision of the court." *Commonwealth v. Durling*, 551 N.E.2d 1193, 1195 (Mass. 1990) (emphasis added). Thus, under Massachusetts law, even though Mr. George was placed on straight probation, he was subject to legal disposition of the charges against him and did not receive a suspended sentence. The disposition of the charges against him constitutes a conviction for purposes of Missouri law.

[4] As noted in our Findings of Fact, Mr. George also pled guilty to one count of assault and battery, in violation of Mass. Gen. L. Ann. ch. 265 § 13A(a). Although the guilty plea to this second charge is in the record, the Director did not rely on it as part of his basis for refusal of Mr. George's application, nor—as significant in the proceedings before us—does the Director rely on it in his Answer, or his motion for summary decision. We deem the second charge abandoned by the Director for purposes of these proceedings.

Therefore, we conclude that Mr. George's guilty plea and placement on straight probation in Massachusetts constitutes a conviction for purposes of § 375.141.1(6).

The crime was a felony

In Missouri, a crime is a felony if (a) "it is so designated" or (b) "persons convicted thereof may be sentenced to death or imprisonment for a term which is in excess of one year." § 556.016.2, RSMo (2000). Mr. George's crime satisfies either prong. First, under Mass. Gen. L. Ann. ch. 274, § 1 (West 2005), "[a] crime punishable by death or imprisonment in the state prison is a felony." Mr. George's crime, Mass. Gen. L. ch. 265, §13B, allows for imprisonment in the state prison and is therefore designated a felony under Massachusetts law.

Second, Mr. George's crime has a maximum prison term of more than one year—specifically, ten years.

Mr. George therefore was convicted, of a felony, for purposes of § 375.141.1(6), which suffices as grounds for refusal of his application.

Mr. George committed a crime of moral turpitude

Mr. George's felony conviction for indecent assault and battery on a child under fourteen years of age also qualifies as a "crime involving moral turpitude" for purposes of § 375.141.1(6).

The statute does not define "moral turpitude," but the concept exists in other disciplinary contexts and has been examined by Missouri courts. For example, in attorney disciplinary cases, the Supreme Court has "long defined moral turpitude as 'baseness, vileness, or depravity' or acts 'contrary to justice, honesty, modesty or good morals.'" *In re Duncan*, 844 S.W.2d 443, 444 (Mo. 1993) (internal citations and quotations omitted). *See also Brehe v. Mo. Dep't of Elem. and Secondary Educ.*, 213 S.W.3d 720, 725 (Mo. App. W.D. 2007) (same definition used in discipline of teaching certificate).

Not all criminal acts are acts of moral turpitude. *Brehe*, 213 S.W.3d at 725. Missouri courts have examined several types of criminal acts in license discipline and related cases, and held that certain ones always constitute acts of moral turpitude, others may, and some never do. In *Brehe,* the court explained there are three categories of crimes:

> 1. crimes that necessarily involve moral turpitude, such as fraud (so-called "Category 1" crimes);
> 2. crimes "so obviously petty that conviction carries no suggestion of moral turpitude," such as illegal parking ("Category 2" crimes); and
> 3. crimes that "may be saturated with moral turpitude," yet do not necessarily involve it, such as willful failure to pay income tax or refusal to answer questions before a congressional committee ("Category 3" crimes).

213 S.W.3d at 725, *quoting Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954). While Category 3 crimes require inquiry into the circumstances, crimes such as murder, rape, and fraud fall into Category 1 because they are invariably regarded as crimes of moral turpitude. *Brehe,* 213 S.W.3d at 725.

The evidence shows that Mr. George's victim was his thirteen-year-old stepdaughter, but the record before us contains no other details of the crime Mr. George committed.

The text of the statute under which Mr. George was convicted, Mass. Gen. L. ch. 265, §13B, provides little detail, either:

> Whoever commits an indecent assault and battery on a child under the age of 14 shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2 1/2 years. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.
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> In a prosecution under this section, a child under the age of 14 years shall be deemed incapable of consenting to any conduct of the defendant for which such defendant is being prosecuted.

But the contours of the statute have been fleshed out by Massachusetts case law. The

Massachusetts Court of Appeals has explained that "in order to prove indecent assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant committed an intentional, unprivileged and indecent touching of the victim." *Commonwealth v. Mosby*, 567 N.E.2d 939, 941 (Mass. App. Ct. 1991), *quoting Commonwealth v. Perretti*, 477 N.E.2d 1061, 1066 (Mass. App. Ct. 1985). The court further explained that "the intentional, unjustified touching of private areas such as 'the breasts, abdomen, buttocks, thighs, and pubic area of a female' constitutes an indecent assault and battery." *Mosby*, 567 N.E.2d at 941, *quoting Commonwealth v. De La Cruz*, 443 N.E.2d 427, 432 (Mass. App. Ct. 1982).

The court added that "[a]n indecent assault and battery is essentially an act or series of acts which are fundamentally offensive to contemporary moral values.... [I]t is behavior which the common sense of society would regard as immodest, immoral and improper." *Mosby*, 567 N.E.2d at 941, *quoting Perretti*, 477 N.E.2d at 1066.

The Massachusetts court's definition of "immodest, immoral and improper" is indistinguishable from the Missouri Supreme Court's definition of moral turpitude as "acts contrary to justice, honesty, modesty or good morals." *In re Duncan*, 844 S.W.2d at 444 (further citations omitted). And sexual contact with one's minor step-daughter is an act contrary to justice, honesty, modesty and good morals.

We additionally note that courts in other states generally recognize crimes of indecent assault or non-consensual sexual touching as crimes of moral turpitude. *See Pinzon v. Gonzales*, 175 Fed. Appx. 911, 914 (9th Cir. 2006) ("when the illegal sexual conduct forming the basis of the offense is not consensual, courts usually consider the crime to be one involving moral turpitude"); *Maghsoudi v. I.N.S.*, 181 F.3d 8, 15 (1st Cir. 1999) (Massachusetts conviction for indecent assault is a crime of moral turpitude). *Accord Mehboob v. Attorney General*, 549 F.3d

272, 278 (3rd Cir. 2008) ("[a] survey of the cases reveals the consensus that moral turpitude inheres in strict liability sex offenses").

In view of the foregoing, we conclude that Mr. George's crime is a Category 1 crime.

Mr. George was convicted of a crime of moral turpitude, for purposes of § 375.141.1(6), which suffices as grounds for refusal of his application.

Mr. George is estopped from arguing
that he did not commit the crime

Mr. George pled guilty to the crime, and such guilty plea is competent and substantial evidence that he committed it. *Dir., Dep't of Public Safety v. Bishop*, 297 S.W.3d 96, 99 (Mo. App. W.D. 2009).

As noted in the Procedure section, above, Mr. George now argues that he did not commit the crime, he only pled guilty on the advice of his attorney. We also note that his denial is in evidence because it is included in one of the Director's exhibits.

But under Missouri law, a defendant who pleads guilty and is sentenced—regardless of whether execution of that sentence is suspended—is estopped from attempting to prove in another proceeding that he did not commit the crime. *James v. Paul*, 49 S.W.3d 678, 682-83 (Mo. 2001); *Carr v. Holt*, 134 S.W.3d 647, 649 (Mo. App. E.D. 2004).

Accordingly, Mr. George's claim that he did not commit the crime cannot tip the scales in his favor.

Discretion

We note that in some application refusal cases, the statutory appeal procedure vests in this Commission the same degree of discretion as the licensing agency, and the authority to exercise our discretion in a way different than exercised by the agency. *See State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App. K.C.D. 1974).

But § 374.051.1, RSMo (Supp. 2012), applicable here, provides us no such discretion:

> Any applicant refused a license or the renewal of a license by order of the director under sections 374.755, 374,787, and 375.141 may file a petition with the administrative hearing commission alleging that the director has refused the license. The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in determining whether the applicant may be disqualified by statute. Notwithstanding section 621.120, the director shall retain discretion in refusing a license or renewal and such discretion shall not transfer to the administrative hearing commission.

(Emphasis added.) Under this provision, we make findings of fact and conclusions of law to determine "whether" an applicant may be disqualified, and the Director retains the discretion to decide whether a license shall be refused.

As discussed above, we have concluded that grounds exist under § 375.141.1(6) for refusal of Mr. George's application. Because we have no discretion in regard to whether Mr. George should receive a license, our conclusion is sufficient to sustain the Director's refusal.

Summary

The Director's motion for summary decision is granted.

The hearing presently scheduled for January 6, 2014 is canceled.

SO ORDERED on January 2, 2014.

\s\ Alana M. Barragán-Scott
ALANA M. BARRAGÁN-SCOTT
Commissioner